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July 8, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA COURIER**

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

**Re: In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tenn. Code Ann. Section 65-4-201(d) – CC Docket No. 98-92**

Dear Secretary Salas:

On behalf of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), enclosed for filing are an original and twelve (12) copies of Hyperion's Opposition to the Petition for Reconsideration filed by TDS Telecommunications Corp. in the above-referenced docket. Hyperion has also submitted a copy of its Opposition on diskette, formatted in Word Perfect 5.1, to Ms. Janice M. Myles.

Should you have any questions concerning this filing, please do not hesitate to contact us.

Very truly yours,



Dana Frix  
Kemal Hawa

Counsel for AVR, L.P. d/b/a  
Hyperion of Tennessee, L.P.

cc: John Glicksman  
Phil Fraga  
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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**RECEIVED**

**JUL 8 1999**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of	)	
	)	
AVR, L.P. d/b/a	)	
Hyperion of Tennessee, L.P.	)	
Petition for Preemption of Tennessee Code	)	CC Docket No. 98-92
Annotated § 65-4-201(d) and Tennessee	)	
Regulatory Authority Decision Denying	)	
Hyperion's Application Requesting	)	
Authority to Provide Service in Tennessee	)	
Rural LEC Service Areas	)	

**OPPOSITION OF AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P. TO THE  
PETITION FOR RECONSIDERATION OF TDS TELECOMMUNICATIONS CORP.**

AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") hereby submits this Opposition to the Petition for Reconsideration of TDS Telecommunications Corporation ("TDS") in the above-captioned proceeding.

**I. INTRODUCTION**

On May 27, 1999, the Commission granted in part Hyperion's petition for relief in this proceeding by preempting Tennessee Code § 65-4-201(d), which barred the entry of competitive carriers into the service areas of incumbent local exchange carriers in Tennessee that serve fewer than 100,000 access lines, and the order of the Tennessee Regulatory Authority ("TRA") to the limited extent that it denied Hyperion's application to provide service in the service area of Tennessee Telephone Company on the basis of Tenn. Code § 65-4-201(d).<sup>1</sup> TDS now asks the

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<sup>1</sup> AVR, L.P. d/b/a Hyperion of Tennessee, L.P., *Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, Memorandum Opinion and Order, CC Docket No. 98-92, FCC 99-100 (rel. May 27, 1999) ("Order").

Commission to vacate its Order on the grounds that the Commission erroneously rejected TDS' arguments in the initial proceeding.

## **II. TDS FAILS TO OFFER NEW EVIDENCE OR ARGUMENTS TO SUPPORT RECONSIDERATION**

To warrant reconsideration under Section 1.106(b)(1) of the Commission's Rules,<sup>2</sup> the petitioner must introduce new factual evidence or make new legal arguments.<sup>3</sup> TDS offers neither, and therefore fails to provide a basis for reconsideration by the Commission.

Instead of offering new evidence or analysis, TDS' Petition returns to the same three themes it relied upon in its Comments and Reply Comments in this proceeding: (1) that competitive neutrality is not required under § 253(b) if other interests are sufficiently compelling;<sup>4</sup> (2) that Tenn. Code § 65-4-201(d) is "competitively neutral" because preemption of the statute would, allegedly, create competitive imbalances;<sup>5</sup> and (3) that preemption of Tenn. Code § 65-4-201(d) is beyond the Commission's authority.<sup>6</sup> The Commission has already considered and rejected each of these arguments in its Order. *See footnotes 4-6.* Hyperion addresses each of these three claims below.

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<sup>2</sup> TDS fails to plead the legal basis for its filing of a Petition for Reconsideration. Hyperion assumes for the purposes of this opposition that TDS' Petition will be deemed to have been filed pursuant to Section § 1.106(b)(1) of the Commission's rules, 47 C.F.R. § 1.106(b)(1).

<sup>3</sup> *See, e.g., Metropolitan Fiber Systems, Inc.; Election of Open Video System Option and Motion for Extension of Time to Complete Open Video System Transition*, Order on Reconsideration, CC Docket No. 97-169, 8 Comm. Reg. (P & F) 76 (rel. May 16, 1997).

<sup>4</sup> Petition for Reconsideration at 5-6, 10. TDS made this argument in its Comments at 5-7 and its Reply Comments at 2. The Commission rejected the argument at ¶¶ 15-16 of its Order.

<sup>5</sup> Petition for Reconsideration at 6-8. TDS made this argument in its Comments at 8-11 and its Reply Comments at 3-4. The Commission rejected the argument at ¶ 17 of its Order.

<sup>6</sup> Petition for Reconsideration at 12-14. TDS made this argument in its Comments at 1-3, 15-18. The Commission rejected the argument at ¶¶ 21-22 of its Order.

### III. TDS AGAIN FAILS TO RECOGNIZE THAT SECTION 253(B) MANDATES COMPETITIVE NEUTRALITY

TDS protests the Commission's determination that it is unable, as a matter of law, to consider the potential benefits of Tenn. Code § 65-4-201(d) for universal service or other public interest considerations. TDS chides the Commission for "cling[ing] to its view that a lack of competitive neutrality" renders a law or regulation ineligible for protection under § 253(b).<sup>7</sup> The Commission's well-stated position on competitive neutrality is not a "view." Competitive neutrality is the law of the United States, established unambiguously by Congress as one of two *mandatory* pre-conditions for invocation of Section 253(b). Accordingly, the Commission's Order concluded: "[t]hat Tenn. Code Ann. § 65-4-201(d) and the Denial Order are not competitively neutral suffices of itself to disqualify these requirements from the 253(b) exception."<sup>8</sup>

Therefore, under the two-step analysis that must be applied for a determination under § 253(b), the absence of competitive neutrality precludes reliance upon the § 253(b) exemption regardless of other mitigating factors. TDS argues boldly (and without citation) that the Telecommunications Act of 1996 "does not limit the scope of the remedy a state can justify under section 253(b) to protect the interests listed there."<sup>9</sup> However, a plain reading of § 253 illustrates that the scope of remedies available to a state is limited. Otherwise, the detailed procedures for preemption in § 253(d) would be meaningless.

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<sup>7</sup> Petition for Reconsideration at 4 (internal quotations omitted).

<sup>8</sup> Order at ¶ 18 (citations omitted).

<sup>9</sup> Petition for Reconsideration at 8-9.

As it did in its initial comments, TDS makes reference to Section 253(f) as support for its conclusion that a state may bar competitive entry in rural markets.<sup>10</sup> However, the TRA's exclusion of Hyperion from the Tennessee Telephone's service area in no way rested on § 253(f), and therefore this provision is not at issue in this proceeding. Hyperion agrees with TDS that § 253(b) enables states to implement policies other than those authorized by § 253(f); however, TDS once again fails to recognize that any state action taken under § 253(b) must be competitively neutral.

Hyperion shares TDS' concern for universal service and the protection of the public interest. However, these important objectives cannot shield the unlawful barrier to entry erected by Tenn. Code § 65-4-201(d). The preemption of Tenn. Code § 65-4-201(d) does not mark the demise of these values in rural Tennessee. Instead, it provides the TRA an opportunity to write a new chapter in the development of telecommunications competition in Tennessee while considering carefully new policies which will promote universal service and protect the public interest. The future of these issues in Tennessee lies with the TRA in a post-monopoly era, not in reconsideration of the Commission's Order.

#### **IV. TDS CONTINUES TO MISREAD THE PROPER APPLICATION OF "COMPETITIVE NEUTRALITY"**

As an alternative to its argument that competitive neutrality is not required, TDS reasons that Tenn. Code § 65-4-201(d) is competitively neutral because, without the statute, rural carriers could be subjected to competition from differently-situated carriers. The Commission previously rejected this argument, finding that, even if a state may apply different standards to differently-situated

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<sup>10</sup> Petition for Reconsideration at 9. TDS made the same argument in its Comments at 2-3.

carriers, that "[a]t the very least, 'competitive neutrality' for the purposes of § 253(b) does not countenance absolute exclusion."<sup>11</sup>

Furthermore, TDS' renewed attempt to draw the Commission into a hypothetical analysis of the Tennessee market after preemption is premised on a fundamental misunderstanding of the legal significance of the term "competitive neutrality" as it is used in § 253(b). Section 253(d) requires the FCC to preempt a state statute or regulation that does not satisfy § 253(a) and is not competitively neutral in violation of § 253(b). Instead, TDS twists § 253 by arguing that the Commission is barred from preempting a statute or regulation if the effect of the *preemption*, as opposed to the effect of the law in question, would result in competitive incongruities. Insisting that the preemption of Tenn. Code § 65-4-201(d) results in a competitive imbalance, TDS protests that the "Commission went on to reach a result consistent only with Orwell's *Animal Farm*, where 'some pigs are more equal than others.'"<sup>12</sup>

TDS' argument is, of course, hogwash. By focusing on the effect of preemption, TDS is looking at the wrong side of the equation. The aftermath of preemption, while an important matter, is not at issue in this proceeding. This proceeding exists for the Commission to determine whether Tenn. Code § 65-4-201(d) violates federal law, and the Commission has correctly determined that it does. The Commission is not charged in this docket with anticipating and resolving all of the new challenges that may arise from the preemption of Tenn. Code § 65-4-201(d). Instead, it is the responsibility of TDS, Hyperion and other concerned parties to work with the Tennessee Legislature

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<sup>11</sup> Order at ¶ 17.

<sup>12</sup> Petition for Reconsideration at 7.

and the TRA to develop new, lawful regulations that address these concerns. The responsibility of promoting universal service and the public interest in Tennessee belongs first to the TRA, not the Commission.

**V. THE COMMISSION'S PREEMPTION DOES NOT EXCEED THE EXTENT NECESSARY TO UPHOLD FEDERAL LAW**

Throughout this proceeding, TDS has argued that any preemption of Tenn. Code § 65-4-201(d) in its entirety would exceed the Commission's constitutional and statutory authority.<sup>13</sup> Now that the Commission has in fact preempted the statute, TDS renews its claim that the Commission's "blanket preemption of section 65-4-201(d) of the Tennessee law exceeds its authority under federal law interpreting the Supremacy Clause of the U.S. Constitution and the specific language of section 253(b)."<sup>14</sup> In its Order, the Commission rejected this argument, concluding that Tenn. Code § 65-4-201(d) was inconsistent with federal law in every circumstance and that the law must therefore be preempted in its entirety.<sup>15</sup>

For the Commission's preemption to have been overbroad, there must be some portion of Tenn. Code § 65-4-201(d) that is not inconsistent with federal law. TDS, however, has not identified any redeemable portion of the preempted law. Instead, TDS argues that the Commission should not have preempted the statute because its alleged purpose is consistent with federal law. However, the purpose of a statute is relevant only to gauge its intended application, and the application of § 65-4-

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<sup>13</sup> TDS Comments at 15-18.

<sup>14</sup> Petition for Reconsideration at 12. TDS may have intended to refer to § 253(d) instead of § 253(b).

<sup>15</sup> Order at ¶ 22.

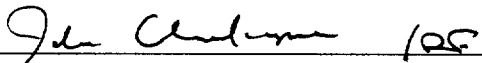
201(d) is not in doubt. Therefore, the Commission's preemption was limited "to the extent necessary to correct" the violation of federal law in accordance with § 253(d).

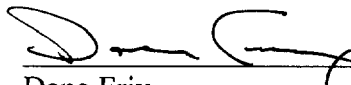
TDS criticizes the Commission for "rob[bing] Tennessee of the authority to pursue the legitimate rural safeguards intended by Tennessee law." However, nothing in the Commission's Order prevents the Tennessee Legislature or the TRA from developing new, competitively neutral laws or regulations to protect universal service and the public interest.

## VI. CONCLUSION

For the reasons stated herein, and for the reasons set forth in the Commission's prior order in this proceeding, the Commission should deny TDS' Petition for Reconsideration.

Respectfully submitted,

  
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Dated: July 8, 1999

## CERTIFICATE OF SERVICE

I, Karen Biscoe, hereby certify that true copies of the foregoing Opposition to the Petition for Reconsideration, filed by AVR, L.P. d/b/a Hyperion of Tennessee, L.P. in CC Docket No. 98-92, have been served via first-class mail, or by hand delivery where indicated with an asterisk, to the parties identified below:

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